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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1990

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, and the RHODE ISLAND PUBLIC UTILITIES COMMISSION,

Cross-Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE, and COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

Cross-Respondents.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

SHELDON WHITEHOUSE
Special Asst. Attorney General
(Counsel of Record)

BRENDA K. GAYNOR
Special Asst. Attorney General
c/o Department of Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400
Attorneys for Cross-Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining that States or state governmental entities which fall within the plain meaning of the term "public bodies" are precluded from obtaining Niagara Power Project power for the benefit of State consumers of electricity? Specifically,

1(a). Did the Court of Appeals abuse legislative history and violate basic rules of statutory construction by exalting language found only in the legislative history over plain statutory terms, such as "States" and "public bodies," contained in the Niagara Redevelopment Act?

1(b). Did the Court of Appeals violate basic principles of federalism by construing the statutory term "States" to mean municipal or cooperative retail electric utilities?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit were those in the caption, and, as petitioners: Allegheny Electric Cooperative, Inc., Upstate Public Utility Services Association, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, and Power Authority of the State of New York.

As Intervenors: Allegheny Electric Cooperative, Inc., Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric and Gas Corporation, City of Cleveland, Ohio, Public Service Electric & Gas Company, City of New York, Port Authority of New York and New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company.

As respondent: Federal Energy Regulatory Commission.

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In The

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JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, and the RHODE ISLAND PUBLIC UTILITIES COMMISSION,

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v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE, and COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

Cross-Respondents.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1990, rehearing denied February 12, 1991.

OPINIONS BELOW

The decision of the Federal Energy Regulatory Commission ("FERC") is reported at 48 FERC Rep. (CCH) ¶61,124 (1989) (Opinion 329) (64-109a).[1] The decision of the Commission denying rehearing is reported at 49 FERC Rep. (CCH) ¶61,068 (1989) (110-114a). The decision of the Court of Appeals is reported at 922 F.2d 73 (2d Cir. 1990) (1-24a).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1990(1a). The Second Circuit denied rehearing on February 12, 1991 (115a). Pursuant to Rule 12.3 of the Rules of this Court (eff. January 1, 1990), this cross-petition is filed not more than 30 days after receipt on May 10, 1991 of the petition for a writ of certiorari of the New York City Public Utility Service filed with this Court in *NYCPUS v. FERC*, No. 90-1721. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

[1] The opinion is reprinted in the Appendix to Petitions for Writ of Certiorari jointly filed by the New York City Public Utility Service ("NYCPUS"), the Vermont Department of Public Service ("VDPS"), and the County of Westchester Public Utility Service Agency ("COWPUSA"), which have petitioned separately for review by this Court in *NYCPUS v. FERC*, No. 90-1721, *VDPS v. FERC*, No. 90-1725, and *COWPUSA v. FERC*, No. 90-1760, respectively. Citations to the Appendix are made to the page number therein as "___a".

STATUTORY PROVISION INVOLVED

Section 836 of Title 16 of the United States Code is set forth in the Appendix (116a).

STATEMENT OF THE CASE

Billions of gallons of water flowing through the Niagara River make it a vast hydroelectric resource. Public power interests, private power interests and States sought to claim this resource, and the various opposing interests fought each other to a standstill in Congress for years. H. R. Rep. No. 862, 85th Cong, 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News, 1585, 1586 (hereinafter "House Report"); S. Rep. No. 539, 85th Cong., 1st Sess. Calendar No. 547, pp. 3, 10 (1957) (hereinafter "Senate Report"). Then, on June 7, 1956, a rockslide destroyed most of the investor-owned hydroelectric plant on the American side. House Report at 1587; Senate Report at 3. The Canadians put the full flow of the Niagara river to their own use, costing the United States hundreds of millions of dollars in economic waste. House Report at 1587. This emergency made compromise urgent and essential. House Report at 1587; Senate Report at 3.

Compromise was not reached without struggle:

> If the good Lord lets me live, I have taken a pledge that never again – save only when the solemn interest of the sovereign State of Oklahoma is vitally involved – will I ever thrust myself into the vortex of such convulsive human emotions as those which revolved around my head as I attempted to bring order out of the

> human-provoked chaos that abounded in that committee room.

103 Cong. Rec. 14,447 (1957) (Remarks of Sen. Kerr). Nevertheless, in 1957, Congress hammered out compromise legislation that became the Niagara Redevelopment Act, 16 U.S.C. §836 (hereinafter the "Niagra Redevelopment Act" or "NRA"), to distribute low-cost hydroelectric power from the Niagara Power Project among those interested in this enormously valuable resource.

A third of a century later, FERC's Opinion 329, 48 FERC Rep (CCH) ¶61,124 (1989), effectively rewrote the statute to confer on municipal electric retail monopolies and cooperatives a legislative rout they were unable to win in Congress. Perhaps because of the economic, political and philosophical warfare that has raged between investor-owned and cooperative or municipal utilities throughout their history, *see*, R. Rudolph and S. Ridley, *Power Struggle* (1986), FERC ignored a vital third interest: the States. FERC, and now the Second Circuit, have performed statutory reconstruction that trammels the role of the States.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THIS WRIT IN ORDER TO REVIEW, AND REIN IN, THE USE OF LEGISLATIVE HISTORY.

This case, much travelled and no less travailed, comes before this Court for it to assay and balance four terms: "public bodies"; "widest possible use"; "yardstick

competition" and "State." These four terms dominate the issues here presented. The preeminent one, as determined by FERC and the Court of Appeals, is the only one to be found nowhere in the language of the Niagara Redevelopment Act: "yardstick competition."

The judge-conferred supremacy of "yardstick competition" has turned "States"[2] into municipal or cooperative retail electric utilities. In order to accommodate the sovereignty of "yardstick competition," the established legislative meaning of "public bodies," developed and confirmed over a series of similar predecessor statutes,[3] is vacated.

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[2] The NRA on its face doubly includes States: first, directly, as entities to which Niagara power can be sold, *see, e.g.*, 16 U.S.C. §836(b)(4); and second, as "public bodies." 16 U.S.C. §836(b)(1). *See* discussion *infra* at Section II. The Court below viewed Rhode Island's argument as a request "to carve out an exception for States." 922 F.2d at 86. We have come to a woeful pass in the use of legislative history when a court feels constrained from implementing the plain language of a statute specifically describing a distinct role for States, lest it "carve out an exception" to an economic theory found only in the legislative history.

[3] The Boulder Canyon Project Act of 1928, 43 U.S.C. §617(d)(c), the Tennessee Valley Authority Act of 1933, 16 U.S.C. §831(i), the Bonneville Project Act of 1937, 16 U.S.C. §§832b, 832c(a), and the Fort Peck Project Act of 1938, 16 U.S.C. §§833b, 833c, developed the federal preference. The Bonneville Act and the Fort Peck Act defined the term "public bodies" specifically to include states. 16 U.S.C. §832b; 16 U.S.C. §833b; *see also, Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 384 (1984). This established meaning must be respected. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329

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The NRA language requiring power from the Niagara Power Project to "be made available . . . in such manner as to encourage the *widest possible use*," 16 U.S.C. §836(b)(1) (emphasis added), was completely ignored in FERC's *Initial Decision*, 42 FERC Rep. (CCH) ¶63,018 (Feb. 16, 1988), and the decision below, and FERC'S Opinion No. 329 discards it offhand.[4]

There is little to justify the judicial exaltation of this "yardstick competition"concept.[5] It was not even

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(1981), *reh'g denied*, 453 U.S. 950 (1981); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.) ("If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute"). Even FERC admitted before the Second Circuit that "Congress inserted in the NRA the type of 'federal preference' found in other federal power statutes. . . . " Respondent's Brief at 25-26, *Allegheny Electric Cooperative, Inc. v. FERC*, 922 F.2d 73 (2d Cir. 1990) (No. 89-4125).

[4] Opinion No. 329 finds that "the argument that [the MDA's and VDPS] can give a greater number of end users access to the power is irrelevent." 48 FERC Rep. (CCH) ¶61,124 at 61,467. The court below never addresses the arguments raised over the "widest possible use" language. This summary dismissal of the statutory language is suspect. *Harborlite Corp. v. ICC*, 613 F.2d 1088 (D.C. Cir. 1979); *Getty v. Fed. Sav. and Loan*, 805 F.2d 1050, 1055 D.C. Cir. 1986).

[5] "Yardstick competition" may have been the darling of a faction of Congress in 1956, but it has little practical significance. One FERC Commissioner has already observed: "[A]n entity's ability to price electricity cheaply because of access to a cheap power source provides no meaningful yardstick

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undisputedly accepted in the legislative history. The legislative history is replete with references to a State role under the NRA.[6] The House Report summarizing the

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against which to measure the performance of an entity that has no access to the cheap power source." Opinion No. 229, *Declaratory Opinion and Order Affirming with Modifications Initial Decision*, 30 FERC Rep. (CCH) ¶61,323 (March 27, 1985) (Commissioner Stalon, dissenting). Moreover, electric rates are not set by the market, but by individual utility rate filings. FERC itself has treated the rates of neighboring utilities as "irrelevant" in setting rate levels. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181 (D.C. Cir. 1987).

> What rates are "just and reasonable" will in general depend on a utility's legitimate costs, and those costs can of course vary widely even among neighboring utilities. . . . That some utilities with monopoly markets adjacent . . . are allowed to charge more than [a utility] thus presumably signifies nothing more than that [the utility] has access to cheaper sources of power, or for some other reasons has fewer legitimate costs.

Id. at 1208 (Mikva, J., dissenting). FERC on occasion has taken actions on the purported basis of preserving "yardstick competition," *see*, Opinion 284, *S. Cal. Edison Co.*, 40 FERC Rep. (CCH) ¶61,371, 62,172 (1987); Opinion 62, *S. Cal. Edison Co.*, 8 FERC Rep. (CCH) ¶61,198, 61,693 (1979); Opinion 57, *Florida Power & Light Co.*, 8 FERC Rep. (CCH) ¶61,121, 61,455 (1979), but Rhode Island has found no case in which FERC has ever actually applied the so-called yardstick to make a rate adjustment. This concept does not merit disinterment from the legislative history.

[6] *See, e.g*, 103 Cong. Rec. 13,194 (1957) (Remarks of Rep. Delaney), 13,195 (Remarks of Rep. Blatnik), 13,196 (Remarks of Reps. Blatnik and Cherdoff), 13,197 (Remarks of Rep. Blatnik),

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proposed statute for the benefit of Congress, *supra*, repeatedly references an allocation to States, U.S. Code Cong. and Admin. News at 1593, 1594, including allocations "to privately owned companies, to preference customers . . . , *and* to neighboring States. . . . " *Id.* at 1595 (emphasis added).[7] The entire House Report never mentions "yardstick competition." To the contrary, at 1593, 1594, it states:

> There is no disagreement that project power should be made available to neighboring states. . . . There is disagreement, however, as to the maximum amount of project power subject to the preference provisions which should be required to be made available. . . .
>
> [The NRA] provides that a reasonable portion of Niagara power subject to preference provisions must be made available for use within reasonable economic transmission distance in neighboring States but not in excess of 20 percent of the power subject to the preference provisions. On this basis if we assume that ultimately the Niagara project will produce some 2 million

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13,200 (Statement of Robert Moses), 13,202 (Remarks of Reps. Miller and Dooley), 13,204 (Remarks of Reps. Keogh and Miller), 13,205-6 (Remarks of Rep. Ostertag), 13,208 (Remarks of Rep. Flood), 14,438 (Remarks of Sen. Chavez), 14,439 (Remarks of Sen. Ives), 14,446 (Statement by Sen. Neuberger), 14,451 (Remarks of Sen. Kerr), 14,452 (Remarks of Sen. Clark).

[7] The Senate Report is to similar effect, emphasizing the compromise nature of the bill as the emergency quelled the previous controversy. Senate Report, *supra* n.2, at 3, 10. The Senate Report also repeatedly references an allocation to States. *Id.* at 2, 7, 8 ("to provide a reasonable amount of power for distribution to other industries and other States, municipalities, rural electric cooperatives, and other such users").

> kilowatts of firm power, 1 million kilowatts would be subject to the preference provisions and 200,000 kilowatts would be available for neighboring States.

It is well established that legislative history is a tool of which courts should be wary.[8] *Piper v. Chris-Craft Ind., Inc.*, 430 U.S. 1, 26 (1977), *reh'g. denied*, 430 U.S. 976 (1977); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981); *See* A. Kozinski, "Hunt for Laws' 'True' Meaning Subverts Justice," *Wall Street Journal*, January 31, 1989 (App. 9).

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[8] Statutory construction should seek to derive "a commonsense, everyday understanding of [the statute's] language and Congress['s] gloss on it." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 109 S.Ct. 2893, 2901 (1989). Remarks of individual legislators, even a bill's sponsor, are not controlling in analyzing legislative history. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), and even formal committee reports should not sway a court from the plain language of Congress. *Pa. R.R. v. Int'l Coal Mining Co.*, 230 U.S. 184, 199 (1913). "The meaning of the statute must, in the first instance, be sought in the language in which the act is framed. . . . " *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also, North Dakota v. United States*, 460 U.S. 300, 312, (1983). In *United States v. James*, 478 U.S. 597 (1986), the Court explained: "The starting point in statutory interpretation is 'the language [of the statute] itself. [W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used.' " (citations omitted). *Id.* at 604. There is no more persuasive evidence of the purpose of the statute than the words, used by the legislature. *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543 (1940). The customary presumption is that the words used by Congress are conclusive evidence of the legislative purpose. *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 772 (1984), *reh'g denied*, 467 U.S. 1267 (1984); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570-571 (1982).

Additionally, the scope of its use has been the subject of debate among the Justices, *see, Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 109 S.Ct. 1981 (1989); *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939 (1989); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 109 S.Ct. 2558 (1989), and commentators. *See, e.g.*, Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263 (1982); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 Am. Univ. L. Rev. 277 (1990). This case presents the opportunity to this Court to review a use of legislative history that Rhode Island submits is well beyond proper bounds.

II. THE COURT SHOULD GRANT THIS WRIT TO RESTORE PRINCIPLES OF FEDERALISM LOST IN THE PURSUIT OF LEGISLATIVE HISTORY BELOW.

The legislators who passed the Niagara Redevelopment Act would be astounded to learn they had not meant States when they allocated Niagara preference power to "public bodies." 16 U.S.C. §836(b)(1). In 1957, Congress had already passed the Boulder Canyon Project Act of 1928, the Tennessee Valley Authority Act of 1933, the Bonneville Project Act of 1937, and the Fort Peck Project Act of 1938, and States were preference customers eligible to receive federal hydropower under all of them. Boulder Canyon Project Act, 43 U.S.C. §617(d)(c); Tennessee Valley Authority Act, 16 U.S.C. §831(i); Bonneville Project Act, 16 U.S.C. §§832b, 832c(a); Fort Peck Project Act, 16 U.S.C. §§833b, 833c.

These statutes developed the federal preference at issue here. The last two of them, the Bonneville Project

Act and the Fort Peck Project Act, gave "preference and priority to public bodies and cooperatives," 16 U.S.C. §§832c(a) and 833c, in language effectively adopted by the subsequent Niagara Redevelopment Act. 16 U.S.C. §836(b)(1) ("preference and priority to public bodies and non-profit cooperatives"); *Power Authority of the State of New York ("PASNY") v. FERC*, 743 F.2d 93, 98 (2d Cir. 1984). Under the Bonneville Project Act and the Fort Peck Project Act, the term "public bodies" specifically included States: "As employed in this chapter, the term 'public body', or 'public bodies', means States,. . . . " 16 U.S.C. §§832b and 833b; *see also, Aluminum Co. of Am., supra* n.3, at 384. This history gave "public bodies" an established meaning in the preference context, which must be respected in any construction of the Niagara Redevelopment Act. *N.L.R.B. v. Amax Coal Co., supra* n.3, at 329. As the court below has held, "the history is clear that Congress was adopting the usual federal preference," *PASNY v. FERC*, 743 F.2d at 105, and the usual federal preference by 1957 included States.[9]

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[9] The Boulder Canyon Project Act had allocated firm energy directly to the States of Arizona and Nevada. The Twentieth Century Fund, ed., *Electric Power and Government Policy* 501 (1948). The NRA provided for sales to the states, out of which States must "observ[e]" the preference. 16 U.S.C. §836(b)(2). Under FERC's theory the State's entitlement to purchase Niagara power is no more than the preference for municipal electric utilities. FERC's Opinion No. 329 and the Court's decision below effectively relegate Rhode Island to providing clerical services for municipal and cooperative electric utilities. Under FERC's decision, States may only obtain an allocation if they go completely into the retail electricity distribution business. It is unreasonable to presume Congress intended this

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Separate from its use of the established term "public bodies," the text of the Niagara Redevelopment Act directly gives States a prominent role. The NRA provides that States may designate bargaining agencies, in which case the Power Authority of State of New York ("PASNY") "shall deal only with such agency in that State" for the "procurement of such power on behalf of such State." 16 U.S.C. §836(b)(2). Indeed the Act provides for "the sale of power to . . . such States." *Id.; see also* 16 U.S.C. §836(b)(4) ("sale . . . to the neighboring States"). As compromise legislation the NRA was not precise as to the exact scope of the States' role, but its terms clearly contemplate a significant role.[10]

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requirement. When Congress crafted the role for neighboring States into the text of the NRA, there is no indication any neighboring State was in the retail electricity distribution business.

When Congress enacted the NRA, public power was predominately municipal and federal, with cooperatives and public utility districts often franchised separately. *See, generally,* R. Rudolph and S. Ridley, *Power Struggle* (1986); C.F. Phillips, *The Regulation of Public Utilities*, 2d ed., 598-599 (1988). States were rarely involved directly in the distribution of power to retail customers. The Twentieth Century Fund, *supra*, at 547, cites only Nebraska, Oklahoma, South Carolina and Texas as having established districts or authorities to sell hydroelectric power. Of these, only Nebraska and Texas had state authorities that sold to retail customers. PASNY itself did not provide retail service until after the St. Lawrence project went in to service in 1958.

[10] The NRA was established to be a compromise between two Senate bills (S. 512, the Clark bill, and S. 1037, the Ives/Javits bill). *PASNY v. FERC*, 743 F.2d at 99. The two Senate bills

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Is there anything more to this than an ordinary error of statutory construction? Rhode Island submits there is. States are special entities under our federal system. Numerous provisions of the United States Constitution reflect and embody the special concern for States held by the founders of our national government and the architects of the Bill of Rights and other Amendments to the Constitution.

As Justice Scalia has said, statutory construction must be "compatible with the surrounding body of law into which the provisions must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind." *Green v. Bock Laundry Mach. Co.*, 109 S.Ct. at 1994 (Scalia, J. concurring). The preeminent body of law surrounding statutory provisions involving States is the body of constitutional law preserving our federal system. For FERC and the Second Circuit effectively to

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each explicitly preserved a considerable State role. The Clark bill would have provided Niagara Power Project power "to the preference customers enumerated . . . , and to the neighboring States. . . . " S. 512, 85th Cong., 1st Sess. (1957), Sec. 2(b)(2) (App. 1). The States were required only to "observ[e]" the preference in distributing the power to be sold to them. *Id.*, Sec. 2(b)(3). The Ives/Javits bill provided for power "to be made available . . . in neighboring States to be distributed according to their laws." S. 1037, 85th Cong., 1st Sess., (1957), Sec. 3(e) (App. 5). Only a "reasonable amount of" the power made available in neighboring States was to be "allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities." *Id.*, Sec. 3(f). Under both bills from which the compromise was forged, Rhode Island would have had authority over significant amounts of preference power.

construe States out of a statute in which they are expressly and repeatedly included is an offense against this well-settled body of law. Cramming States into a procrustean analysis designed for municipal and cooperative corporations and other bodies ("every town and local library," 922 F.2d at 85) plainly offends these principles of federalism.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

SHELDON WHITEHOUSE
Special Asst. Attorney General
(Counsel of Record)

BRENDA K. GAYNOR
Special Asst. Attorney General
c/o Department of Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400
Attorneys for Cross-Petitioners

Providence, Rhode Island
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APPENDIX

DEVELOPMENT OF POWER AT NIAGARA FALLS, N. Y.

WEDNESDAY, APRIL 10, 1957

UNITED STATES SENATE.
COMMITTEE ON PUBLIC WORKS,
SUBCOMMITTEE ON FLOOD CONTROL—
RIVERS AND HARBORS,

Washington, D. C.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 412, Senate Office Building, Hon. Robert S. Kerr, presiding.

Present: Senators Kerr (chairman of the subcommittee), Gore, Neuberger, Scott, Carroll, Case, Kuchel, Cotton, and Hruska.

Also present: Senators Clark (Pennsylvania), Ives (New York), Javits (New York), and Congressman Miller (New York).

Senator Kerr. The committee will be in order.

We have before us S. 512 and S. 1037, bills to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

(S. 512 and S. 1037 follow:)

[S. 512, 85th Cong., 1st sess.]

A BILL To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled. That pursuant to the provisions of the reservation of the Senate of the United States in giving its advice and consent to the ratification of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, which provides that no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress, a project for the redevelopment of the United States share of such waters for power purposes is hereby authorized, in accordance with existing general laws of the United States and this Act. This authorization constitutes compliance with the reservation to said treaty and is consistent therewith.

Sec. 2. (a) The Federal Power Commission is hereby authorized and directed to issue a license to the New York Power Authority for the construction and operation of the project, upon its application therefor and its acceptance of licensing conditions set forth in this section.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In contracting for the disposition of project power, the licensee (the New York Power Authority) shall (A) give equal preference for the purchase of such power to (i) counties and municipalities, including their agencies or instrumentalities, (ii) departments, agencies, and instrumentalities of New York State, (iii) rural electric cooperatives not organized or administered for profit but primarily for the purpose of supplying electric energy to

their members as nearly as possible at cost; and (iv) the defense agencies of the United States, and (B) make flexible arrangements and contracts for the disposition of project power to utility companies organized and administered for profit, with suitable provisions in such contracts for the withdrawal upon reasonable notice and fair terms of enough power to meet the needs of the foregoing classes of preference customers.

(2) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in subparagraph (1) (A) of this subsection, and to the neighboring States in accordance with paragraph (3) of this subsection.

(3) The licensee shall make a reasonable portion of the project power available for use within economic transmission distance to neighboring States and shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. With respect to the share of the power so allocated, the arrangements

made by the licensee for the sale of power to or in such States shall include observance of the preferences numbered (i) and (iii) in subparagraph (1)(A) of this subsection.

(4) Project power shall be sold and distributed primarily for the benefit of the people as consumers, and particularly for the benefit of domestic and rural consumers, to whom it shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraph (4) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, shall construct a scenic drive and park of the American side of the Niagara River, near the Niagara Falls, pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall be $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construc-

tion of the remedial work, including engineering and economic investigations, undertaken in accordance with article II of the treaty referred to in the first section of this Act whenever such remedial works are constructed by the United States.

Sec. 3. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

Sec. 4. This Act may be cited as the "Niagara Redevelopment Act of 1957".

[S. 1037, 85th Cong., 1st sess.]

A BILL To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

CONGRESSIONAL FINDINGS

SECTION 1. The Congress hereby finds and declares—

(a) that an emergency exists in the western part of the State of New York as a result of a rock slide which on June 7, 1956, destroyed most of the facilities employed by the licensee of Federal Power Commission project 16 for the generation of power by the use of waters of the Niagara River;

(b) that the power generated at such facilities was largely used by electrochemical and electromet-

allurgical industries vital to the defense of the United States and employing a large portion of all workers resident in the vicinity;

(c) that these industries would be forced to curtail their operations drastically or abandon them at a cost of tens of thousands of jobs were it not that they are able to receive necessary power at high cost on a temporary basis from the generating facilities of the Hydro-Electric Power Commission of Ontario which is using not only Canada's share of the water permitted under the treaty signed on February 27, 1950, between the United States and Canada, but also a large part of the United States share of such water;

(d) that the licensee of project 16 is entitled to use nineteen thousand seven hundred and twenty-five cubic feet per second of the United States share of the waters until 1971 and to use a further twelve thousand seven hundred and seventy-five cubic feet per second until further order of the Commission;

(e) that by the use of this total of thirty-two thousand five hundred cubic feet of water per second, the licensee of project 16 annually produced approximately four billion kilowatt-hours of energy;

(f) that a modern hydroelectric plant proposed to be constructed by the Power Authority of the State of New York to take advantage of the entire drop of the Niagara River can produce about the same amount of power by the use of nineteen thousand seven hundred and twenty-five cubic feet of such water per second;

(g) that by the use of this water and of the additional water p rmitted to be used under the 1950 treaty, approximately thirteen billion kilowatt-hours annually of urgently needed power can be produced by the project; and

(h) that it is, therefore, imperative that the works to produce such power be constructed without fu i ther delay.

ISSUANCE OF LICENSE

SEC. 2. The Federal Power Commission is hereby expressly authorized and directed to issue a license pursuant to the Federal Power Act to the Power Authority of the State of New York for a power project with capacity to utilize all of the United States share of the waters of the Niagara River permitted by international agreement.

CONDITIONS OF LICENSE

SEC. 3. The Federal Power Commission shall include among the conditions of the license issued under section 2—

(a) a provision requiring the licensee to reimburse the United States for its share of the cost of construction of remedial works, including engineering and economic investigations, undertaken in accordance with article II of the 1950 treaty;

(b) a provision requiring the licensee, as a part of the cost of the project and in cooperation with the agency of the State of New York in charge of the development of parks, to protect the scenic values of the American side of the gorge in a manner similar to that in which they have been safe-guarded on the Canadian side and to construct a scenic drive and park on the American side of the Niagara River near Niagara Falls pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission;

(c) a provision requiring the licensee to contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of project 16 for a period ending on the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five

thousand kilowatts of power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for the same general purposes for which power from project 16 was utilized and in order to restore as nearly as possible low power costs: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (i) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or the State of New York except just compensation for tangible property and rights-of-way actually taken, (ii) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights or other rights relating to the diversion of the use of water, whether founded on legislative grant or otherwise;

(d) a provision giving defense agencies of the United States a preference to purchase power;

(e) a provision requiring a reasonable amount of power to be made available within the project's economic market area in neighboring States to be distributed according to their laws;

(f) a provision requiring that a reasonable amount of the power available in the State of New York and of the power made available in neighboring States under paragraph (e) be allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities in the project's economic market area.

SHORT TITLE

Sec. 4. This Act may be cited as the "Niagara Development Act of 1957".

THE WALL STREET JOURNAL TUESDAY, JANUARY 31, 1989

Hunt for Laws' 'True' Meaning Subverts Justice

[Article Follows]

By Alex Kozinski

Can you be sent to jail for conduct that does not violate the language of the law but nevertheless is contrary to legislative intent? How precisely must Congress draft the statutes that govern our behavior? How far may courts legitimately go in filling the gaps left by the legislature?

The answers to these questions, raised by many of the cases we see in the courts today, have profound implications—not merely for those who litigate the issues, but, more fundamentally, for the way in which we govern ourselves. Over the past half-century the idea that the law consists of objective rules has been supplanted by the view that it is a matter of the subjective intent of those who promulgate legal instruments. I call this trend the subjectification of the law.

There are many examples of this subjectification of the law. In many states, for example, it is no longer possible to enforce a contract drafted by sophisticated, knowledgeable parties without a trial to decide what the parties really meant when they agreed to language that seems perfectly clear to the average Joe.

A Scavenger Hunt

The subjectification trend is even more apparent in the way courts now interpret statutes. No longer is the statutory language the sole, or even the most significant, index of legislative will. Instead, attorneys and courts often engage in a kind of scavenger hunt through the contradictory documents that comprise a statute's legislative history, in the hope of discovering the law's "true" meaning. It is disconcerting to note how many briefs—and judicial opinions—start with reference to the legislative history and proceed on to a discussion of policy, overlooking the statutory language altogether.

While the subjective approach to legal language is now so pervasive it is difficult to imagine any other approach, it is actually of relatively recent origin. In a lecture delivered to the Bar Association of the City of New York in 1948, Justice Felix Frankfurter warned of the emergence of a then new and disturbing trend in legislative interpretation—one that looked at what the legislature meant to do, rather than what it in fact did.

In the intervening 40 years, Justice Frankfurter's worst fears have been realized. The justice would no doubt be shocked to pick up a legal publication and find advertisements for the legal profession's latest cottage industry—legislative-intent services. A typical ad promises to help the attorney "overcome the statute's 'plain meaning,' overcome contrary case law," "move from strength where no case law exists. . . . and more!" In light of such titillating promises, I feel almost prudish in reminding lawyers that, under traditional canons of statutory construction, once we discern the plain meaning of the statute that is the end of the matter.

As I see it, the subjectification of law has very serious implications. To the extent our legal environment provides fertile soil for entrepreneurs who can turn a profit from overcoming a statute's plain meaning, we inject a large dose of uncertainty into the law. Figuring out what 535 legislators, organized in two houses and a variety of committees, plus the president, may have meant in passing a statute is a cumbersome and inexact exercise, even if one is able to accept the idea of a collective intent.

It is also expensive. If the statute is carefully drafted, a lay person can frequently determine its plain meaning simply by reading it; figuring out what the legislature really intended requires costly and time-consuming litigation. Indeed, subjectification of the law encourages litigation: Even when the law seems clear, litigants may be willing to roll the dice that a court can be persuaded to overlook the statute's plain meaning.

The willingness of courts to look far beyond a statute's language also encourages legislators to be sloppy and evasive. If courts are not going to be bound by the statute's language anyway, why bother to be precise? Legislators often find it convenient to be vague and let the courts figure it out. Justice Frankfurter described a cartoon depicting a senator who tells his colleagues, "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means."

To Justice Frankfurter, this was the epitome of legislative irresponsibility. I fear we may have long passed that point. It seems as if legislators now pass statutes because of, not despite, their lack of clarity. Indeed, imprecise or ambiguous language has become a tool of political compromise. The insider-trading laws, for example, are left intentionally vague, with some legislators taking the position that drawing precise lines would be bad in that it would allow people to stay clear of the law. Many provisions in the environmental laws, from the original Clean Air Act to the Superfund legislation, are written almost as if designed to invite litigation.

By using vague language, legislators can avoid making the difficult political choices that they have to confront when drafting a statute precisely. When statutory language is subject to varying interpretations, all sides can claim victory in the hope that the courts will eventually adopt their position. Legislators agree to disagree, and then try to influence future judicial interpretation by sprinkling the record with contradictory snippets of legislative history. This attitude is encapsulated in an excerpt from the Congressional Record, cited by Justice Scalia in a recent opinion, where a congressman is quoted as saying: "I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it."

Judges who start playing legislator are tempted to treat all laws—including the Constitution—as a springboard for implementing their own sense of right and wrong.

When legislators leave statutory language ambiguous, they abdicate their responsibility of giving the law policy content. That function shifts from the politically elected—and responsible—branches of government to judges who are appointed for life. While some may view this as a desirable shift, it is clearly not how our government is supposed to work and subverts an important aspect of our system of checks and balances.

Dealing with nebulous statutory language and providing policy content for vacuous legislative enactments is also unhealthy for the courts. Judges who get into the habit of playing legislator find it tempting to start treating all laws—including the Constitution—as merely a springboard for implementing their own sense of right and wrong. As Justice Frankfurter remarked in his prescient lecture, it takes much self-discipline to determine statutory purpose in a principled fashion; the hunt for legislative intent, he noted, "might justify interpretation by a judicial libertine, not merely a judicial libertarian."

No Easy Way Out

There is no easy way out of our present conundrum. The draconian solution, noted without much enthusiasm by Justice Frankfurter, would be to follow the English rule that parliamentary intention can be discovered only by reading the statute—not committee reports or other tidbits of legislative history. I am confident that we shall never fully adopt that approach. Yet we have surely gone too far in asking courts to fill in the gaps the legislature has left, intentionally or not. While a sudden abdication of all reference to legislative materials could be disruptive, courts might start making it clearer that legislative intent not embodied in legislative language counts for very little.

By treating legislative history with a healthy dose of skepticism, courts can encourage lawmakers to embody their political compromises to the words of the statute, not in contradictory bits of rhetoric dotting the legislative record. Lawyers must be taught that the plain language of the statute sometimes makes litigation pointless—if not frivolous. The time has come for the judiciary to make clear once again that we are a nation of laws, not of legislative histories.

Judge Kozinski serves on the Ninth Circuit Court of Appeals in Pasadena, Calif.

Judge Kozinski's Skepticism

Judge Kozinski has also written skeptically of legislative histories in his court opinions.

In the 1986 parole case of *Wallace v. Christensen* he wrote, "The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. . . . Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they supposedly represent, much less by the full Senate or House of Representatives; they cannot be amended or modified on the floor by legislators who may disagree with the views expressed therein. Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short-circuit the legislative process, leading to results never approved by Congress or the President. Of course, all this goes doubly for floor statements by individual legislators."

In the 1988 case *In Re Kelly*, which involved the bankruptcy code, Judge Kozinski wrote, "Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that votes on the bill. The opposite inference is far more likely."